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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. ~~72~~-789

UNITED TRANSPORTATION UNION,

Petitioner,

VS.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Respondent.

Petition For A Writ of Certiorari To The United States Court Of Appeals For The Seventh Circuit

---

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No. ——

UNITED TRANSPORTATION UNION,

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CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

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Petition For A Writ of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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United Transportation Union prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above entitled cause on August 1, 1972.

OPINIONS BELOW

The opinion of the court of appeals disposed of appeals by the United Transportation Union, petitioner here, and by the respondent here. That opinion is not yet reported, but is set out as Appendix A to this petition.

This petition deals with the second injunction pending appeal granted in this case. (The decision on the merits is the subject of a second petition for certiorari which will be filed this month as No. ———, October Term, 1972). The first injunction pending appeal was granted in 1969 and was affirmed by the Court of Appeals at 422 F. 2d 979 and also set out as Appendix B. The union's petition for certiorari, at that time, was denied by this Court at 403 U.S. 904.

JURISDICTION

The judgment of the Court of Appeals was entered on August 1, 1972 and is set out as Appendix C to this petition. A petition for rehearing was filed within the time allowed and was denied on September 21, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1) Whether a district court having held on the merits that it is without jurisdiction to enter an injunction because a labor dispute was involved within the meaning of the Norris-LaGuardia Act can, nevertheless, enter an injunction pending appeal;

2) Whether a district court can enter an injunction pending appeal without satisfying the applicable equitable standards on such motions.

STATUTES AND RULE INVOLVED

Sections 1, 4, 5, 7 and 9 of the Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C. §§ 101, 104, 105, 107 and 109, are set forth in Appendix D hereto. The All-Writs Statute, 1 Stat. 72, 28 U.S.C. § 1651, and Rule 62 (c) F. R. Civ. P. are also set forth in Appendix D.

STATEMENT OF THE CASE

The Chicago and North Western Railway Company filed its suit on November 20, 1969 seeking an injunction to prohibit a strike by the United Transportation Union over a Section 6 Notice dealing with the number of employees to be used on the railroad's operating crews. The temporary restraining order was issued and, after a hearing, the district court held, at the close of the railroad's case, that the question raised by the railroad was not justiciable. Nonetheless, the district court entered an injunction pending appeal in spite of the fact that it recognized that *E. J. & E.* v. *B. R. T.*, 7 Cir., 302 F. 2d 545 (1962) prohibited such an injunction. On appeal, the Seventh Circuit affirmed the district court's ruling on the merits and also affirmed the issuance of the injunction pending appeal expressly overruling the *E. J. & E.* case. The union's petition for writ of certiorari from that injunction was denied. The railroad's petition for certiorari from the judgment on the merits was reversed by this Court at 402 U.S. 570.

On remand, the district court issued a preliminary injunction and ordered the parties to engage in further negotiations. That injunction is reported at 330 F.S. 646. After those negotiations, a further hearing was had. Following the conclusion of the hearing, the district court refused a permanent injunction and dissolved its preliminary injunction. That judgment is reported at 346 F. Supp. 1149.

The railroad filed a Notice of Appeal and a motion seeking an injunction pending appeal. Over the protests of the union, a second injunction pending appeal was issued. The Findings of Fact, Conclusions of Law and Injunction Pending Appeal are set out as Appendix E.

This result was foreordained. Even prior to the hearing on the preliminary injunction, the district court stated what its ruling would be should there be a motion for an injunction pending appeal. (Tr. Oct. 27, 1971, pps. 6 and 7):

> "Being practical men, you know and the railroad knows the state of the law, as I see it, preserved in this case. They would immediately ask if I should refuse an injunction on the merits, a final injunction —they would immediately, relying upon that case and also upon the precedents set up under the rules for granting an injunction pending appeal—I am sure that is what they would ask and we might as well know I would grant it so that we know where we are pending appeal. There would not be any juggling around."

The hearing on the motion was perfunctory although it extended over a period of time. On the first date, the court adjourned the hearing on the ground that it was premature until a notice of appeal was filed. On the following day, January 7, the district court limited the discussion on the motion and indicated that it would issue the injunction pending appeal. The court directly stated:

> "The only thing I think is really at issue is the amount of bond here".

No presentation in support of its motion was made by the railroad except that it did inform the court about one of the 2 issues later raised in their appeal on the merits.

No other hearing was held except that the injunction was formally entered on January 10, in open court, but the discussion dealt entirely with the form of the injunction and the form of the findings of fact and conclusions of law. All of the union's objections were overruled. An appeal was taken from the injunction pending appeal. The Court of Appeals for the Seventh Circuit affirmed the issuance of the injunction pending appeal.

REASONS FOR GRANTING THE WRIT

1) The decisions below decide important questions dealing with the Norris-LaGuardia Act as affected by the judicial power to grant injunctions pending appeal in this railroad labor dispute. Such questions have not been, but should be, decided by this Court because of their magnitude and because of this Court's supervisory jurisdiction over the lower courts. Those decisions of the court below are contrary to the congressional purpose embodied in the Norris-LaGuardia Act and wrongfully revive a labor injunction business which that Act had obliterated.

2) The decision below conflicts with the holding of this Court in *United States* v. *United Mine Workers,* 330 U.S. 258 (1946).

3) The decisions of the Court of Appeals wrongly distinguished between an appeal *pendente lite* and an injunction pending appeal in labor disputes. The correct decision holding that there is no such distinction was enunciated in *Elgin, Joliet & Eastern Ry. Co.* v. *Brotherhood of Railroad Trainmen,* 7 Cir., 302 F. 2d 545, cert. den. 371 U.S. 823 (1962) which case was overruled by the first decision below. Permitting those decisions to stand will disrupt the purpose and the plan of the Railway Labor Act and will undermine the purpose of Congress in other labor legislation.

4) The decisions of the court below are contrary to the decision of this Court per Mr. Justice Brandeis in *Virginian Railway* v. *United States,* 272 U.S. 658.

ARGUMENT

A. This case decided an important question dealing with the Norris-LaGuardia Act, 29 U.S.C. §101 et seq. as affected by the Railway Labor Act 45 U.S.C. §151 et seq. and the inherent powers of the federal judiciary, particularly as those powers are codified in the All-Writs Act, 28 U.S.C. §1651.[1] That question twice decided by the court below in favor of the jurisdiction of the federal courts despite the Norris-LaGuardia Act's withdrawal of jurisdiction from the federal courts in what is concededly a labor dispute and in which the procedures of the Railway Labor Act have been exhausted, is a question which has never been decided by this Court and which is of such substantial magnitude that it should be so decided. The question raised by each decision is identical because the second Opinion relies almost totally on the first Opinion to justify its affirmance of the second injunction pending appeal.

This question was before this Court in *Order of Railroad Telegraphers* v. *Chicago & North Western Ry. Co.*, 362 U.S. 330, 342 (1960) and was left unanswered as follows:

> "There are other subsidiary questions raised with reference to . . . an injunction pending appeal under Rule 62 (c) of the Federal Rules of Civil Procedure. But since we have determined the main controversy between the parties, we think it inadvisable to decide either of these questions now. We intimate no opinion concerning either at this time."

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1. The first Seventh Circuit Opinion also refers to Rule 62 (c), 65 (e) and Rule 82 of the Federal Rules of Civil Procedure. These rules, while germane, do not affect the phrasing of the basic question presented.

The court below in its first Opinion held that the question presented was answered in part, at least by inference, in the concurring opinion of Mr. Justice Frankfurter in *United States* v. *United Mine Workers*, 330 U.S. 258 (1946) at 330 U.S. 307, 310 [The Seventh Circuit's further comment that *Mine Workers* is also apt because it also deals with a ". . . difficult question of jurisdiction" (Appendix B, page A18) is obviously not determinative]. The decision below is an unwarranted reliance on *Mine Workers* and begs the question presented by the Norris-LaGuardia Act. That decision asserting a jurisdiction in the federal courts to grant injunctions pending appeal because of its holding that the Norris-LaGuardia Act by its terms must specifically withdraw such jurisdiction, constitutes an act of judicial arrogance.

As this Court said in *Marine Cooks & Stewards* v. *Panama Steamship Co.*, 362 U.S. 365, 369 (1960), the Congress of the United States, in the Norris-LaGuardia Act, was intent upon taking the courts, both trial and appellate, "out of the labor injunction business". That Act should be construed in light of that purpose; it is not to be derogated to the general powers of the federal judiciary. The court below committed fundamental error when it "struck the balance" in favor of "maintaining the *status quo*".

That action, far from being supported by *United States* v. *United Mine Workers*, 330 U.S. 258 (1946) is, in fact, contrary to the *ratio decidendi* of that decision. That decision holds that the definitions contained in the Norris-LaGuardia Act compel the holding that jurisdiction is withdrawn from the federal courts in all "labor disputes". Only after examining the Act in detail, and as a whole, does the United States Supreme Court hold, in accord-

ance with customary statutory construction, that it did not apply to the Federal Government itself. The court below, however, seized on the issuance of the temporary restraining order to preserve the *status quo* pending the district court's decision as to its jurisdiction to provide the asserted "support" for the Seventh Circuit's decision. Such "support" is without substance and precipitates a situation where this Court's supervisory power over the lower courts should be exercised. Especially is this so when the very fibre of the Norris-LaGuardia Act has been attacked by the decision below.

The decisions of the court below purport to consider the Norris-LaGuardia Act in relationship to the All-Writs Act. Its treatment of the effect of the Railway Labor Act is so cursory that it approaches the non-existent. When those 3 Acts are considered together, it is apparent that the provisions of the Norris-LaGuardia Act must be considered to be paramount. Any other treatment results in a subversion of the Norris-LaGuardia Act and revives the labor injunction business in the federal courts.

B. To reach its result, the court of appeals overruled *E.J.&E.* v. *B.R.T.*, 7 Cir., 302 F. 2d 545, cert. den. 371 U.S. 823 (1962). It is respectfully submitted that *E.J.&E.* correctly stated the proper policy in these matters and properly interpreted the general purposes of the Norris-LaGuardia Act. In discussing that policy, the Seventh Circuit quotes from *Chicago, Rock Island & Pacific Railroad Co.* v. *Switchmen's Union of North America*, 292 F. 2d 61, 71 (1961) and then states the policy established by the Norris-LaGuardia Act, 302 F. 2d 547, 548:

> " 'Beyond this, whatever the general rule as to the scope of review of temporary injunctions may be, no such principle as plaintiffs advocate can be applicable

to a claim that such an injunction transgresses the command of § 4 of the Norris-LaGuardia Act. That section uses the most emphatic words possible—'No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction' against a peaceful strike. To overcome that bar plaintiffs had the burden of showing, as a matter of law, that the broad command of § 4 is subject to an exception when a union has violated its duties under the Railway Labor Act and, as a matter of fact, that the defendant here had done that. They were obliged to meet that burden, not simply to show they might be able to meet it; until they met it, the court was without power to issue an injunction whether temporary or permanent.' "

"True, there is a distinction from the case at bar. The Rock Island case was an appeal from a temporary injunction pending a hearing on the merits, while the instant case is a temporary injunction pending an appeal. However, unless some distinction can be drawn between the impact of the Norris-LaGuardia Act on an injunction issued *pendente lite* and a temporary injunction pending a hearing on appeal, the holding of the Second Circuit provides a guide for a decision on the issue before us."

It is respectfully submitted that the Seventh Circuit in *E.J.&E.* correctly stated the policy which should govern the interpretation of the Norris-LaGuardia Act. There can be no meaningful distinction between an injunction *pendente lite* and a temporary injunction pending a hearing on appeal. Each has the same effect. Each breaks the strike.

The judicial construction indulged in by the court below recreates a type of judicial abuse which the Norris-LaGuardia Act attempted to abolish. That Act was passed because of a clear history of strike breaking by injunction. The legislative history recognizes that fact that

strikes often were not merely postponed by the issuance of an injunction but were broken never to be revived.

For this reason, the Act was passed with a very clear congressional intent to end any injunctive interference in labor relations. To make perfectly plain that this intent was not to be frustrated by judicial construction, as had been done so often in the past, the Act did not deal alone with the substantive law to be applied but, instead, withdrew jurisdiction from the federal courts. For that specific reason, the language of the Act uses the term of art, "Court of the United States." That phrase was chosen so as to limit the jurisdiction of all of those courts created by Congress under Article 3 of the United States Constitution. *International Longshoremen's Union* v. *Wirtz*, 170 F. 2d 183 (1948).

The Congress of the United States knew full well that the ingenuity of lawyers was equal to the task of contending in any and all circumstances that "a case of first impression" or a new and novel point of law was present. This congressional purpose was rephrased by Mr. Justice Murphy dissenting in *United States* v. *United Mine Workers*, at 330 U.S. 340:

> "Unlike most other situations, this Act specifically prohibits the issuance of restraining orders except in situations not here involved. There is no exception in favor of a restraining order where there is some serious doubt about the court's jurisdiction; indeed, the prohibition against restraining orders would be futile were such an exception recognized, for the minds of lawyers and judges are boundless in their abilities to raise serious jurisdictional objections."

Nor is the reliance of the court below on practice in other circuits of any value in changing the plain meaning of the Norris-LaGuardia Act. The practice in the other

circuits is determined by circumstances. For example, see *Missouri, Kansas, Texas R.* v. *Brotherhood of Railroad Trainmen*, 5 Cir., 342 F. 2d 298 (1965) where the court granted the union all of the relief sought pending the appeal. As even the court of appeals admits, the opinions on which it relies do not discuss the issue presented here "in depth." Indeed, the union in those cases did not raise the point here involved.

In the instant case, the district judge granted the railroad the identical injunctive relief which it twice refused when the plaintiff railroad had completed its case in each hearing on the merits. Moreover, the district court granted the union none of the relief which it was requesting under its Section 6 Notice pending the appeal.

Ultimately, whether an injunction pending appeal is permitted or prohibited, the decision rests with the district court. The basic thrust of the opinion below implies that the ruling of a district court is less likely to be correct than a ruling by the court of appeals. Such a thesis negatives the purposes of the Norris-LaGuardia Act which was to prohibit any judicial construction by either the district court or a court of appeals. Under the ruling below, the tendency will be to issue injunctions pending appeal in all cases and to effectively nullify the provisions of the Norris-LaGuardia Act, especially in those cases in which the appeal is not expedited as was the instant case.

Though this case involves a determination under the Railway Labor Act, there is no logical reason why if should not be extended to other cases. To the contrary, Railway Labor Act considerations would necessarily seem to preclude its application. As this court has stated on numerous occasions, the Railway Labor Act procedures are purposely long and drawn out. It has been said that

"A final and crucial aspect of the Act was the power given to the parties and to representatives of the public to make the exhaustion of the Act's remedies an almost interminable process." *Detroit and Toledo Shore Line R.* v. *United Transportation Union,* 396 U.S. 142, 149, 90 Sup. Ct. 294, 299 (1969). To tack on an injunction pending appeal subsequent to those interminable processes is not to accommodate the Railway Labor Act to the Norris-LaGuardia Act. It is to destroy both Acts and to substitute the district court's discretion.

C. The decision below approves the district court's finding conjecturing that a strike would result in a mooting of the appeal. No authority is stated for this thesis nor is any authority stated for the conclusion (Appendix B, page A18) that failure to grant an injunction pending appeal would constitute a "serious limitation" on judicial review nor for the further statement that otherwise there could be no "meaningful judicial review" (Appendix B, page A20). Such assertions fly in the face of the Norris-LaGuardia Act and the substitution of litigation for negotiation is contrary to the intent of Congress. That Act was enacted with the purpose that all labor disputes should be settled by collective bargaining.

Moreover, both the district court and the court of appeals are in error in their assertions that there is no way of obtaining a decision absent an injunction pending appeal. An appeal absent an injunction is not rendered moot even if a settlement should be made during a strike or under the threat of a strike. Such a settlement would clearly be made under legal duress. Having obtained its strike demands, the union nevertheless would not be entitled to a dismissal of the railroad's appeal. In such circumstances, it well-established that a case is not rendered

moot until the appellee is entitled, as a matter of right, to a dismissal of the appeal. *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 632 (1953); *N.L.R.B.* v. *General Motors Corporation*, 2 Cir., 179 F. 2d 221 (1950). It is also well settled in Labor Board cases that the Board need not dismiss the proceeding and the Courts need not refuse to enforce the Board's Order because *pendente lite* the original dispute has been settled. *N.L.R.B.* v. *General Motors Corporation, supra*, at 222.

Since the case is not rendered moot as assumed by the courts below, the compelling requirement for an injunction pending appeal is absent here. This being so, the foundation stone for the decision below has been removed. For this reason alone, the decision should be reversed as well as for its patent misconstruction of the Norris-LaGuardia Act.

D. The Court of Appeals overruled *E.J.&E.R.* v. *B.R.T.*, 302 F. 2d 545 and held that an injunction pending appeal cannot be refused in every case in which the Norris-LaGuardia Act, 29 U.S.C. §101 et seq., has been held to prohibit an injunction on the merits. The second appeal involved the converse holding by the District Court; that the union shall always be enjoined while the appeal is taken. That this was the holding below is best demonstrated by the fact that the district court had already declared that it would issue the injunction before there was any mention of the 2 points contained in the railroad's appeal. The mention was of one of the points; the point that the Mediation Board should mediate the dispute for the second time. That point was tersely mentioned and summarily dismissed with the Court stating:

> "I held against you on that, but I am not the one to say that I was right." (Transcript, January 7, 1972, p. 10).

While that was the square ruling of the Court below, it is clear that any such holding obliterates the Norris-LaGuardia Act and its effect so long as there is a pending appeal. Assuming, without conceding a jurisdiction to grant an injunction pending appeal, we submit that the Norris-LaGuardia Act is to be considered in deciding the motion. We would suggest that the burden of proving that an injunction should be issued pending appeal in each case should be squarely placed upon the railroad and that this Court, in the language of *Chicago, Rock Island & Pacific R. Co.* v. *Switchmen's Union,* 292 F. 2d 61, 71, should hold that the railroad is obliged to meet that burden and that, until it is met, the district courts are without power to issue an injunction pending appeal.

The decision below conflicts with the test of a stay in other equitable cases not dealing with or controlled by the Norris-LaGuardia Act as stated by Mr. Justice Brandeis in *Virginian R. Co.* v. *United States,* 272 U.S. 658, 673:

> "But to justify a stay pending an appeal from a final decree refusing an injunction additional facts must be shown. For the decree creates a strong presumption of its own correctness . . .
>
> In this class of cases an appeal bond can rarely indemnify fully even private parties to the litigation for the loss of the benefits of which the stay deprived them. . . . To justify granting the stay after a final decree . . . it must appear either that the district court entertains a serious doubt as to the correctness of its own decision; or that the decision depends upon a question of law on which there is conflict among the courts of the several circuits; or that some other special reason exists why the order . . . ought not to become operative until its validity can be considered by this court."

It is submitted that no basis was shown for the granting of the stay under the *Virginian Railway* test. The unnecessary and excessive humility demonstrated in the repeated comments by the District Court to the effect that it was not the one to say that its decision was "right" is no substitute for compliance with that test. The railroad's Motion also fails to address itself to the issues stating, contrary to the fact, that "legal issues of great importance" are raised and that these issues arise from the June decision of the United States Supreme Court. Similarly, the Findings of Fact are either preliminary, clearly erroneous, or clearly irrelevant (App. E). Finding No. 3 is the only one which could be construed as applying in any way to the *Virginian Railway* test. Its statement that the issues are "substantial" because of first impression and because the Supreme Court laid down no "guide lines" is clearly not factual and, treated as a conclusion, is illogical. No "guide lines" are required for a district court to decide questions of law and of fact. "Guide lines" are necessary only to guide the untrained in areas where they have no familiarity. In any event, the questions presented are common and ordinary and should have been evaluated on their probability of success on appeal and not on the mere fact that they were presented by the railroad.

The decisions made by the courts below create a direct conflict with the proper test enunciated by Mr. Justice Brandeis. This Court should grant the petition in order to resolve that conflict in favor of the prior rule as enunciated in *Virginian* v. *United States, supra.*

CONCLUSION

For the reasons adverted to above, and because of the demands of law and the demands of substantial justice, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Nov. 1972

APPENDIX A

SEPTEMBER TERM, 1971 — APRIL SESSION, 1972

Nos. 72-1115, 72-1118

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,
Plaintiff-Appellee-Cross-Appellant,

UNITED TRANSPORTATION UNION,
Defendant-Appellant-Cross-Appellee.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 69 C 2401
J. SAM PERRY, *Judge.*

ARGUED MAY 22, 1972 — DECIDED AUGUST 1, 1972

Before MR. JUSTICE CLARK*, CUMMINGS and PELL, *Circuit Judges.*

CLARK, *Associate Justice.*

The Chicago and North Western Railway Company (CNW) brought this suit in 1969 to enjoin a threatened strike call by the United Transportation Union (UTU) involving the work rules of employees of Northwestern on its railroad lines. North Western contended that UTU had not complied with its duty under Section 2 First of

* Associate Justice Tom C. Clark, United States Supreme Court, Retired, is sitting by designation.

the Railway Labor Act (45 U.S.C. 8152 First)[1] to "exert every reasonable effort" to settle the work rules dispute between the parties as to the number of brakemen to be employed on CNW's trains. The court issued a temporary restraining order, but subsequently dismissed the suit on the ground that the UTU's duty under Section 2 First was not justiciably enforceable. This court affirmed, 422 F. 2d 979 (1970). The Supreme Court, however, held that CNW's claims of violation were justiciable, 402 U.S. 570 (1971), and directed that the District Court consider and decide them on their merits. After a hearing the District Court joined (August 2, 1971) that the UTU had not — nor had CNW — bargained in compliance with Section 2 First during the various stages of the dispute and that, therefore, self-help in the form of a strike could not be indulged without exhausting "every reasonable effort" to settle the controversy, 330 F. Supp. 646 (1971), and it issued an injunction against a strike, *id.* at 652. The parties renewed their negotiations and additional hearings were held by the District Court in November, 1971. On December 22, 1971, a decree was entered holding that both parties had bargained in good faith and that the UTU was now free to resort to self-help. It further held that the court was without power to remand the dispute to the National Mediation Board (NMB) and it, therefore, dismissed the complaint for want of jurisdiction, 336 F. Supp. 1149. CNW filed its notice of

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1. The sub-section provides:

"It shall be the duty of all carriers, their officers, agents and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

appeal on January 6, 1972, and on its application the District Court entered an injunction pending appeal on January 10, 1972, enjoining a strike. The UTU noted its appeal from the latter order and moved to vacate the injunction or advance the appeal. The motion to vacate was denied, but the appeal was expedited.

1. *The Issues Involved*:

Two issues are involved in this appeal: (1) Did the District Court abuse its discretion in issuing the injunction pending the appeal? And, (2) what steps of the statutory procedure must be revisited when there has not been a good faith compliance with Section 2 First? There is a third question which our disposition obviates, *viz*: What guidelines must the District Court follow in determining whether there has been a good faith compliance with Section 2 First?

We have concluded that the District Court did not abuse its discretion in issuing the injunction and that each of the steps provided by the Act must be reinvoked where the parties have not in good faith heretofore exerted every reasonable effort to settle their dispute. Only in this manner will the taint of previous bad faith be purged.

2. *The Issuance of the Injunctive Relief Pending Appeal*:

The UTU urges that the issuance of the injunction[2] staying the calling of the strike was violative of the

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2. The District Court found that an injunction was necessary to maintain the *status quo* pending the determination of the appeal, because a strike would (1) moot the appeal; (2) irreparably injure CNW and the public, because it would suspend the transportation of freight and passengers resulting in the loss of hundreds of thousands of dollars in revenue each day to CNW; (3) deprive the public of transportation, including 90,000 commuters

Norris-LaGuardia Act and an abuse of discretion. We believe that this contention is completely answered by the holding of this court in the previous appeal in this case [not disturbed by the reversal on other grounds]. See *Chicago & N.W. Ry. Co.* v. *United Transportation Union, supra,* at 983-985. We quote only one paragraph of the opinion:

> "There is nothing in the text of the Norris-LaGuardia Act or in the legislative history surrounding the drafting and enactment of the Act indicating a Congressional intent to remove from the District Court their long recognized power to grant injunctions pending appeal. To remove from the District Courts the power to grant injunctions pending appeal . . . is to in effect make the District Court the court of last resort on these matters regardless of the difficulty or the novelty of the issues involved. In the absence of any specific Congressional intention . . . we decline to read into the Act such a serious limitation into the judicial review process." At 984.

In addition, this is as the District Court found "a case of first impression" in which there are no precedential guidelines to follow and that present a "thorny problem" of explosive quality. In the light of these considerations, the "balance of equities herein favors the granting of an injunction pending appeal. . . ." While the employees here are protected by a million dollar bond, neither the public nor the railroad have any protection from the irreparable injury that would flow from a strike.

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daily, as well as mail, freight, etc.; (4) seriously impair government services, including both military and civilian personnel, supplies, material, etc.; (5) threaten the health and welfare of a whole section of the country because of a shortage of food, medicines, etc.; and (6) stop essential transportation services to millions of people.

As for the claim that the UTU was not afforded a hearing on the injunction issue, the record indicates that CNW gave notice on December 22, 1971 of its intention to seek a stay pending appeal. Some two to three weeks thereafter UTU was given opportunity to and did present its position, but to no avail.

3. *Further Mediation*:

The principal issue involved here — further mediation — is not so easily resolved. However, we start with the proposition that in adopting the Act Congress intended to and did create a "scheme of gradually escalating pressures" as Mr. Justice Brennan aptly described them in *Chicago & N.W. Ry. Co.* v. *Transportation Union, supra* at 597. And, he added: "The Act is built upon a step-by-step framework. Each one is carefully drawn to introduce slightly different pressures upon the parties to reach settlement from the preceding step. First, the parties confer jointly. Next, the National Mediation Board may add its pressure through mediation. . . ." *Id.* In short, "Congress was content to enact a machinery which dragged on, with cooling-off periods and various status quo restrictions, while the parties were required to 'treat with' one another." At 591.

However, as the Court points out in the opinion at 578: "The strictest compliance with the formal procedures of the Act is meaningless if one party goes through the motions with a 'desire not to reach an agreement' ". That is exactly what happened here when the parties previously went through each step of the procedures. The District Court has found on remand of the case that neither party acted in good faith in exerting every reasonable effort to settle their differences. Having so tainted every step of the required procedures of the Act, it is necessary

that they revisit each step in a good faith effort to settle their dispute. The District Court, however, only required that the joint conference step be invoked. We submit that before self-help is permitted that the parties must also exhaust the next step, *i.e.*, the National Mediation Board. This they have not done. This latter step is the very heart of the Act, because it brings into play the mediation expertise of the Board. Still, this most influential and effective step has not in good faith ever been exerted.

In view of this failure to invoke this step, neither UTU nor CNW may under the Act resort to self-help and appropriate restraint must be continued to prevent such exercise. We do not pass upon the action of the District Court with reference to its findings of good faith efforts of the parties in their joint conferences in exerting every reasonable effort to settle their dispute, However the findings of the District Court as to the good faith of the parties in the joint conference stage are such that if they hereafter demonstrate their good faith in mediation, those findings will stand as approved. We do note that in Findings 78 and 79 the trial judge found that UTU would not agree to any proposal for reduction in the size of mainline crews; nor to accept any offer of additional compensation for employees working on crews of one conductor and one brakeman. Nor could CNW agree to the "Jacksonville formula" which most of the railroads have already embraced. In the light of the previous bad faith that the trial court found present at every step of the proceedings, such actions by the parties are suspect and in conjunction with slight evidence of future unwillingness to consider seriously any compromise may well be the basis for a bad faith finding.

Such adamant positions—crystallized during the previous bad faith session of the parties—must be cast aside before good faith negotiation and conciliation will succeed. The trial court must appraise them with exceeding care and make certain that the parties are in "the strictest compliance" with the Act. If what the UTU indicated as to the financial condition of CNW is true, the union may be riding a good horse to death with featherbedding. On the other hand, if the additional brakemen are necessary to the safe and efficient operation of the railroad, they should be put on as they have been by other roads.

REVERSED AND REMANDED.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

IN THE

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1969—JANUARY SESSION, 1970

No. 18109

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,
Plaintiff-Appellee,

v.

UNITED TRANSPORTATION UNION,
Defendant-Appellant

No. 18145

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,
Plaintiff-Appellant,

v.

UNITED TRANSPORTATION UNION,
Defendant-Appellee.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

MARCH 6, 1970

Before SWYGERT, *Chief Judge,* FAIRCHILD and KERNER, *Circuit Judges.*

KERNER, *Circuit Judge.* This opinion contains our decision in two appeals. No. 18145 is the appeal of the Chicago and North Western Railway Company (Railway) from the district court's finding that §2, First,[1] of the Railway Labor Act (45 U.S.C. §152, First) requiring the parties to exert "every reasonable effort" to settle their disputes was not a requirement which anticipated judicial enforcement. Consequently, since the district court found that it did not have jurisdiction to decide whether §2, First, was complied with, and all other procedures of the Railway Labor Act having been exhausted, the district court held that the Norris-LaGuardia Act[2] prohibited the enjoining of a threatened strike by the United Transportation Union (Union). The district court, however, granted an injunction against the threatened Union strike pending an appeal of its decision of the justiciability of §2, First, and the correctness of the court's order granting the injunction pending appeal is the subject of the second appeal, No. 18109, in which the Union is the appellant. We affirm the decision of the district court in both appeals.

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1. 45 U.S.C. § 152, First, provides:
   It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operations of any carrier growing out of any dispute between the carrier and the employees thereof.

2. Section 4 of the Norris-LaGuardia Act (29 U.S.C. § 104) provides in relevant part:

   No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

   (a) Ceasing or refusing to perform any work or to remain in any relation of employment;

   * * * *

The factual basis of the two appeals arose out of a dispute between the United Transportation Union and the Chicago North Western Railway Company over the question of how many brakemen should be employed on the Railway's trains. Such a dispute is commonly known as a crew consist controversy. The dispute was initiated in July of 1965 by service by the Union upon the Railway of notices pursuant to §6 of the Railway Labor Act (Act) (45 U.S.C. §156)[3] requesting a change in agreements to require that not less than two brakemen be employed on every freight and yard crew. In response, the Railway in December of 1965 served notices requesting an agreement that the existing rules respecting minimum crews be rescinded and the matter of crew size be committed to the judgment of management.[4]

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3. Section 6 (45 U.S.C. § 156) provides:

> Carrier and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

4. While the historical background of the litigation involved in crew consist controversies is not directly relevant, a brief discussion of the more recent developments in this area may be helpful for a more meaningful grasp of the problems.

The dispute over the number of brakemen to be employed began to be discussed in 1959 when most of the nation's railroads served

By November of 1969, the parties had held conferences pursuant to §6 (45 U.S.C. §156);[5] the National Mediation Board had mediated the dispute after invocation of mediation pursuant to §5 (45 U.S.C. §155);[6] the Board, pursu-

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notices upon various unions under §6 of the Act proposing rules that would permit, in the discretion of management, the elimination of firemen and reduction in the number of brakemen. The unions countered in 1960 by serving uniform notices proposing a national rule requiring a minimum of two brakemen on every crew.

The issues were joined and negotiated on an industry-wide basis and were not resolved until in the face of a threatened nationwide strike the Congress enacted a compulsory arbitration statute. (77 Stat. 132).

Under the arbitration prescribed by the Congress in 1963, Arbitration Board No. 282 established a national procedure for resolving the "crew consist" issue over the number of brakemen on train crews. The parties were directed to conduct local negotiations on each carrier, and, in the event of failure of agreement, to conduct local arbitration, all pursuant to national guidelines respecting questions of work burden and safety.

The arbitration award expired in January of 1966. The United Transportation Union served notices upon more than eighty railroads pursuant to §6, proposing restoration of the crew of one conductor and two brakemen. The railroads responded with a request for an agreement permitting crew reductions beyond those authorized under the award of Arbitration Board No. 282.

5. See footnote 3, *supra*.

6. Section 5 First and Second (45 U.S.C. §155 First and Second) provide:

> First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:
>
> (a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.
>
> (b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.
>
> The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

ant to §5, had concluded that its efforts had been unsuccessful and had proffered arbitration; the Railway had accepted that proffer but the Union declined; the Board thereupon, on October 16, 1969, had terminated its services pursuant to §5. The President had not appointed an Emergency Board under §10 (45 U.S.C. §106),[7] and the

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In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 160 of this title) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this chapter.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 160 of this title, no change shall be created under section 160 of this title, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

Second. In any case in which a controversy arises over the meaning or the application of any agreement reached through mediation under the provisions of this chapter, either party to the said agreement, or both, may apply to the Mediation Board for an interpretation of the meaning or application of such agreement. The said Board shall upon receipt of such request notify the parties to the controversy, and after a hearing of both sides give its interpretation within thirty days.

7. 45 U.S.C. §160 provides:

If a dispute between a carrier and its employees be not adjusted under the foregoing provisions of this chapter and should, in the judgment of the Mediation Board, threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President, who may thereupon, in his discretion, create a board to investigate and report respecting such dispute. Such board shall be composed of such number of persons as to the Presi-

§5 thirty day "cooling off" period respecting maintenance of the status quo had expired.

At the end of November, the Railway instituted a lawsuit in the district court asking the court to declare that the procedures of the Railway Labor Act had not been exhausted and to enjoin the Union from exercising self-help in the form of strike. The Railway alleged that the Union had not discharged all its obligations under the Railway Labor Act in that it had not complied with §2, First, which imposes upon the parties the "duty to exert every reasonable effort" to settle their disputes. At the same time the Railway filed its complaint it moved for a temporary restraining order which the court granted.

The Railway then presented evidence to show that the Union had violated §2, First, by not bargaining in good faith. At the conclusion of the Railway's case, the court granted defendant Union's motion to dismiss the complaint and dissolved the temporary restraining order on the basis that:

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dent may seem desirable: *Provided, however,* That no member appointed shall be pecuniarily or otherwise interested in any organization of employees or any carrier. The compensation of the members of any such board shall be fixed by the President. Such board shall be created separately in each instance and it shall investigate promptly the facts as to the dispute and make a report thereon to the President within thirty days from the date of its creation.

There is authorized to be appropriated such sums as may be necessary for the expenses of such board, including the compensation and the necessary traveling expenses and expenses actually incurred for subsistence, of the members of the board. All expenditures of the board shall be allowed and paid on the presentation of itemized vouchers therefore approved by the chairman.

After the creation of such board and for thirty days after such board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose.

> §2, First, . . . is a matter for administrative determination and has been determined by the National Mediation Board under the provisions of Sections 5 and 6 of the Railway Labor Act, 45 U.S.C. 155, 156, is not justiciable and this Court does not have jurisdiction to consider or adjudicate disputes with respect to compliance with such subsection, particularly after the National Mediation Board has relinquished its mediatory jurisdiction of a dispute as in this case.

The district court, however, recognizing that there was case law contrary to its decision, that a strike would result in a mooting of the appeal, and that "such a strike would irreparably injure the plaintiff and the public," granted Railway's motion for an injunction pending appeal.

Three days after the district court's decision, the Union filed an emergency motion in this court to vacate the injunction pending appeal. This court issued an order directing that the Union's motion to vacate the injunction pending appeal be taken with the Railway's appeal from the district court's denial of an injunction below. The order also directed that the appeals be expedited. (See *Chicago and North Western Railway Company* v. *United Transporation Union,* No. 18109 unpublished order, 7th Cir. Dec. 19, 1969.)

By ordering that the Union's motion to vacate the injunction pending appeal be taken with the expedited appeal from the district court's denial of a preliminary injunction, we in effect upheld the granting of the injunction pending appeal. Our order of December 19, 1969, in that respect is inconsistent with this court's decision in *Elgin J & E. Ry. Co.* v. *Brotherhood of Railroad Trainmen,* 302 F. 2d 545 (7th Cir. 1962), which held that if the Norris-LaGuardia Act prohibits the granting of an in-

junction below it also prohibits the granting of an injunction pending appeal. We are no longer of the opinion that the *Elgin* case is the correct interpretation of the Norris-LaGuardia Act as it applies to injunctions pending appeal and overrule our decision in *Elgin*. While it may be argued that our decision upholding the district court's denial of a preliminary injunction because of the non-justiciability of §2, First, (see pp. 10-16 *infra*) moots the question of whether the district court erred in granting an injunction pending appeal, the necessity of an explanation of our inconsistent action in our December 19, 1969, order maintaining the injunction pending an expedited appeal and the realization that the continued adherence to an incorrect opinion could cause irreparable harm for many years before the case comes before this court in a technically correct posture, persuades us that the question is not moot but should at this time be decided.

We hold that the Norris-LaGuardia Act does not prohibit the district court from granting an injunction pending appeal even though the court determines that Norris-LaGuardia prohibits an injunction below. The power of a district court to grant an injunction to maintain the status quo pending appeal was first codified by the "All Writs Act" contained in the Judiciary Act of 1789, 28 U.S.C. §1651. In *Scripps-Howard Radio, Inc.* v. *F.C.C.*, 316 U.S., 4 (1942), the Supreme Court in upholding this power stated:

> It has always been held, therefore, that as a part of its traditional equipment for the administration of justice, a federal court can stay enforcement of a judgment pending the outcome of an appeal.
>
> *Id.* at 9-10.

See also Hovey v. *McDonald,* 109 U.S. 161 (1883). Absent the prohibitions of the Norris-LaGuardia Act, the law is established that even if a district court determines it lacks jurisdiction to grant an injunction pending appeal, it has the power to preserve appellate review of its determination that it lacked jurisdiction. *See United States* v. *Shipp,* 203 U.S. 563, 573 (1906); *see also Pettway* v. *American Cast Iron Pipe Co.,* 411 F. 2d 998, 1002-3 (5th Cir. 1969); *Eastern Greyhound Lines* v. *Fusco,* 310 F. 2d 632, 634 (6th Cir. 1962).

In the instant case as in this court's earlier opinion in the *Elgin* case, the injunction pending appeal was issued pursuant to Rule 62(c) of the Federal Rules of Civil Procedure.[8] The Rule itself is not a jurisdictional grant but merely a codification of a district court's power to maintain the status quo pending appeal. In *Elgin,* the court relied on Rule 82 of the Federal Rules of Civil Procedure[9] which provides that the promulgation of the Federal Rules does not expand the district court's jurisdiction, and Rule 65(e)[10] which provides that the Federal

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8. Rule 62(c) of the Federal Rules of Civil Procedure provides in relevaht part:

> When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion many suspend, modify, restore or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party.

9. Rule 82 provides in relevant part:
These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein.

10. Rule 65(e) provides:

> These rules do not modify any statute of the United States relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee; or the

Rules "do not modify any statute of the United States relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee." The *Elgin* court construed Rules 82 and 65(e) as denying the power of the district court to grant an injunction pending appeal pursuant to 62(c) in cases where the Norris-LaGuardia Act prohibited the granting of an injunction in the district court. The *Elgin* court's application of the three Federal Rules of Civil Procedure is correct only if we begin with the premise that Congress by enacting the Norris-LaGuardia Act intended to limit in labor disputes the inherent power of district courts under the "All Writs Act" to grant injunctions pending appeal. If the Congress did not intend such a limitation on the district court's power, Rule 62(c) can be applied without any conflict with the dictates of Rule 82 and Rule 65(e).

There is nothing in the text of the Norris-LaGuardia Act or in the legislative history surrounding the drafting and enactment of the Act indicating a Congressional intent to remove from the district courts their long-recognized power to grant injunctions pending appeal. To remove from the district courts the power to grant injunctions pending appeal and thus the power to maintain the status quo in all cases where the district court has decided that the Norris-LaGuardia Act prohibited an injunction is to in effect make the district court the court of last resort on these matters regardless of the difficulty or novelty of the issues involved. In the absence of any specific Congressional intention to remove the power of

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provisions of Title 28, U.S.C. §2361, relating to preliminary injunctions in actions of interpleader or in the nature of interpleader; or Title 28, U.S.C. §2284, relating to actions required by Act of Congress to be heard and determined by a district court of three judges.

district courts to grant injunctions pending appeal, we decline to read into the Act such a serious limitation into the judicial review process.

The United States Supreme Court in *United States* v. *United Mine Workers*, 330 U.S. 258 (1947) supports our decision. The question before the district court in *United Mine Workers* involved the applicability of the Norris-LaGuardia Act so as to bar the United States from securing an injunction against a strike by United Mine Workers. The district court granted a temporary restraining order which the Union did not obey and the district court found the Union officers to be in contempt. The Supreme Court affirmed the judgment of contempt, finding the Norris-LaGuardia Act inapplicable. The Court went on to hold, however, that even if Norris-LaGuardia applied, the district court still had the power to preserve the status quo while it decided the underlying jurisdictional issue posed by Norris-LaGuardia.

> In these circumstances, the District Court unquestionably had the power to issue a restraining order for the purposes of preserving existing conditions pending a decision upon its own jurisdiction.
> 330 U.S. at 290.

While it is true that *United Mine Workers* involved a temporary restraining order and not as the case at bar an injunction pending appeal, both cases deal with difficult questions of jurisdiction. We read the Supreme Court's holding in *United Mine Workers*, that despite the prohibitions of Norris-LaGuardia the district court has inherent injunctive power to grant a temporary restraining order to preserve the status quo while deciding difficult or novel questions determining its own jurisdiction, as support for the proposition that the district court, despite Norris-LaGuardia, also has the inherent power to grant

an injunction pending a review of its determination of these jurisdictional issues.

The reasoning of Justice Frankfurter in his concurring opinion in *United Mine Workers* would seem to accept our analysis and its extension to this case. Although Justice Frankfurter was of the opinion that the Norris-LaGuardia Act prohibited permanent injunctive relief in the factual situation, he concurred in the majority's result on the basis that the Norris-LaGuardia Act did not bar interim injunctive relief necessary to preserve the status quo while the court decided the jurisdictional question and while that district court jurisdictional determination was being reviewed by the appellate court:

> To suggest that the right to determine so complicated and novel an issue could not be brought within the cognizance of the district court, *and eventually of this court*, is to deny the place of the judiciary in our scheme of government. 330 U.S. at 310 [emphasis supplied].

Although this issue has not been discussed in depth by other courts of appeals, the circuits which have been faced with the problem of district court injunctions pending appeal in a labor dispute have acted consistently with our decision in this appeal. See *Missouri-Kansas-Texas RR. Co.* v. *Brotherhood of Railroad Trainmen*, 342 F. 2d 298 (5th Cir. 1965); *Texas and N.O. RR. Co.* v. *Brotherhood of Railroad Trainmen*, 307 F. 2d 151, 153, 163 (5th Cir. 1962); *Pan-American World Airways* v. *United Brotherhood of Carpenters*, 324 F. 2d 217 (9th Cir. 1963); the district court though denying a preliminary injunction, granted a 10-day stay to preserve the status quo pending appeal to the Court of Appeals); *Norfolk & P.B.L. RR. Co.* v. *Brotherhood of Railroad Trainmen*, 248 F. 2d 34

(4th Cir. 1957; the district court ordered the temporary injunction dissolved, though by supplemental order, the execution of the court's judgment was suspended pending appeal by the carrier).

While we are cognizant of the purposes of the Norris-LaGuardia Act to remove the injunctive power of the judiciary from the field of labor disputes, we are also mindful of the necessity of judicial review to our legal system. In the absence of a specific Congressional directive, we strike the balance in favor of maintaining the status quo to allow time for a meaningful judicial review.[11] [11a]

We now come to the Railroad's appeal in No. 18145 from the decision of the court below that §2, First, of the Railway Labor Act (45 U.S.C. §152) is non-justiciable. We are of the opinion that §2, First, does not contemplate judicial enforcement of its "reasonable effort" requirement and, therefore, affirm the decision of the district court judge.

We construe §2, First, as a statement of the purpose and policy of the subsequent provisions of the Act and not as a specific requirement anticipating judicial enforcement.

> Nor does §2, Second make justiciable what otherwise is not. . . . But §2, Second like §2, First merely states the policy which those other provisions but-

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11. We also reject the appellant Union's contention that the district court abused its discretion in granting the injunction pending appeal. We find no such abuse. Nor do we find the form of the injunction issued pending appeal improper.

11a. Since this opinion overrules *Elgin J. & E. Ry. Co. I. Brotherhood of Railroad Trainmen*, 302 F. 2d 545 (7th Cir. 1962), we have circulated it to the full active court. No judge has requested a hearing *en banc*.

tress with more particularized commands. *General Committee of Adjustment of the Brotherhood of Locomotive Engineers* v. *Missouri-Kansas-Texas Railroad Company*, 320 U.S. 323, 334 (1943).

To imply judicial enforcement to §2, First, would insert a judicial inquiry into every step of the Railway Labor procedures to determine in each case if reasonable effort is being exerted; this is a role which we believe Congress did not intend the courts play in the settlement of Railway disputes.

In *General Committee* v. *M.-K.-T. RR. Co., supra*, the Supreme Court in deciding certain questions of representation under the Railway Labor Act were not justiciable stated:

> In short, Congress by ths legislation has freely employed the traditional instruments of mediation, conciliation and arbitration. Those instruments, in addition to the available economic weapons, remain unchanged in large areas of this railway labor field. On only certain phases of this controversial subject has Congress utilized administrative or judicial machinery and involved the compulsions of the law. Congress was dealing with a subject highly charged with emotion. Its approach has not only been small, it has been piecemeal. Congress has been highly selective in its use of legal machiney. The delicacy of these problems has made it hesitant to goo too fast or too far. *The inference is strong that Congress intended to go no further in its use of the processes of adjudication and litigation than the express provisions of the Act indicate. Id.* at 332-33. [emphasis supplied].

Later in its opinion the Court reiterated:

> [T]he conclusion is irresistible that Congress carved out of the field of conciliation, mediation and arbitration only the select list of problems which it was

> ready to place in the adjudicatory channel. All else is left to those voluntary processes whose use Congress had long encouraged to protect these arteries of interstate commerce from industrial strife. The concept of mediation is the antithesis of justiciability. *Id.* at 337.

We believe that §2, First, was intended to play an integral part in facilitating the other more specific procedures of the Railway Act: "The heart of the Railway Labor Act is the duty, imposed by §2 First upon management and labor. . . ." *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 377 (1969). However, we find that the role of determining whether "reasonable effort" is being practiced by the parties is not a judicial one but a role which should be left to the National Mediation Board.

Under the procedures of the Act, the National Mediation Board plays the dominant role in major disputes within the framework of the Act. Section 6 of the Act provides:

> [I]n every case . . . where the services of the Mediation Board have been requested by either party or said Board has proffered its services, rates of pay, rules or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by §5 of this Act, by the Mediation Board.

Section 5 provides in pertinent part that after the services of the Board are invoked or proffered:

> [S]aid Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its

> final required action to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this Act.
>
> If arbitration at the request by one or both parties shall be refused, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under §10 of this Act, no change shall be made in the rates of pay, rules or working conditions or established practices in effect prior to the time the dispute arose.

Thus it can be seen that the Mediation Board plays a pivotal role in the workings of the Act. It maintains the status quo, attempts to bring about a voluntary settlement between the parties, tries to induce the parties to submit to arbitration after a determination that voluntary settlement cannot be reached, and then in effect, if §10 and the Emergency Board are not appropriate, the Mediation Board after a thirty-day period releases its hold on the status quo.

We believe this integral role of the Mediation Board requires it and not the judiciary to enforce compliance with §2, First. The Mediation Board is certainly better qualified to determine if the parties are exercising reasonable effort in settling their dispute. If the Mediation Board is of the opinion that one of the parties is not negotiating in good faith, it may simply retain jurisdiction over the mediation process until it believes good faith is being exercised. The Act provides that while the Board retains jurisdiction the parties must maintain the status quo. The Board can refuse to certify that "its mediatory-efforts have failed and thus prevent the exercise of self-help until it is satisfied that its mediatory efforts had a

chance to fail, *i.e.*, that the parties were bargaining in good faith. Mediation cannot fail if it never had a chance to succeed."[12]

Instead of involving the federal courts in the determination of whether a reasonable effort had been exercised, after all the procedures of the Act have been completed, it seems much more efficient and sensible to allow the Mediation Board while the Act's procedures are being carried out to determine if a reasonable effort is being exercised by the parties. To allow the Mediation Board rather than the courts to perform this function removes the courts from having to issue injunctions in labor disputes (because §2, First, had not been complied with), thus avoiding conflict with the dictates and policy of the Norris-LaGuardia Act. In addition, a judicial enforcement of §2, First, would also require the federal courts to remand the dispute back to a certain stage in the procedures of the Act where one party was not bargaining in good faith. We find no machinery nor guidelines in the Act which would aid the court in making this difficult determination.

We are mindful that the role of the Mediation Board is basically a non-adjudicatory one, *see e.g., Detroit & Toledo Shore Line Railroad Company* v. *United Transportation Union*, ... U.S. . . . . (Dec. 9, 1969, Slip Opinion, page 17). However, we recognize that for the procedures of the Act to be effective, the Mediation Board must accept in certain instances a limited "quasi ad-

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12. Of course, if one party is not negotiating in good faith as dilatory tactic to prevent the other party from eventually exercising self-help, the Board can decide to release jurisdiction of the dispute and allow the procedures of the Act to be exhausted in order to allow for self-help.

judicatory" posture. Certainly the authority conferred on the Board pursuant to §2, Ninth[13] (45 U.S.C. §152, Ninth), to determine the proper representatives of the employees can be considered adjudicatory or quasi adjudicatory in nature. Similarly, we interpret §2, First, to confer on the Board pursuant to its express mediatory power, the power, whether it may be considered adjudicatory or quasi adjudicatory, to make sure the parties are exercising every reasonable effort. We do not feel this limited power under §2, First, will significantly impair the Board's impartial job as a mediator.

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13. 45 U.S.C. §152, Ninth, provides:

Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

We find that the expertise, proximity to the negotiation process and power to maintain the status quo of the Mediation Board make it singularly well suited to implement the Congressional intent and purpose behind the inclusion of §2, First. While we agree that the procedures of the Act are purposely long and drawn out in order for the parties to reach agreement and prevent invocation of self-help, we are of the opinion that the tacking on of judicial review after a completion of the Act's procedures does nothing but involve courts in intricate factual questions of intent while unreasonably postponing the parties' right to self-help.

The Railway places great reliance that §2, First, is justiciable upon the Supreme Court's decision in *Virginia Ry.* v. *System Federation,* 300 U.S. 515 (1937). In *Virginia Ry.,* the railroad had refused to engage in collective bargaining with the Federation after the National Mediation Board, acting under §2, Ninth, of the Railway Act, determined and certified the Federation to be the representative of the shop craft employees for collective bargaining with the railroad. The Supreme Court upheld a district court injunction which required the railroad to recognize and bargain with the Federation despite the railroad's argument that §2, Ninth, was not justiciable. While the injunction also required the railroad to make every reasonable effort to settle disputes with the Federation thus in fact invoking the dictates of §2, First, the opinion did not state nor imply that whether reasonable effort is in fact complied with by either party was a question for the courts to answer. The Supreme Court did not suggest that the district court retain jurisdiction to determine if the parties were negotiating in good faith, nor did it suggest a further judicial proceeding if conferences between the railway company and the Federation failed. Thus while *Virginia Ry.* holds that §2, Ninth, contemplates judicial enforcement of the requirement to bargain with the Board's accredited employee representa-

tive, it does not hold that judicial enforcement is available to determine whether the parties are in fact negotiating in good faith. As we read *Virginia Ry.*, it allows for judicial enforcement of the specific dictates of §2, Ninth, and simply provides that when the carrier and the employees' representatives are negotiating they should be guided by the other provisions of the Railway Labor Act including §2, First.

In addition, to *Virginia Ry.*, the railway also relies on a recent decision by the Fourth Circuit in *Piedmont Aviation, Inc.* v. *Air Line Pilots Ass'n Int'l*, 416 F. 2d 633 (4th Cir. 1969) (petition for cert. filed, 38 U.S. L.W. 3241, Jan. 6, 1970, No. 995), in which the court upheld a district court injunction against a threatened strike. The court in a holding opposite to our conclusions found:

> Restraining the parties from self-help through strikes or otherwise, until they have complied with the duty to bargain in good faith vindicates the Congressional purpose of providing machinery to prevent strikes without creating an irreconcilable conflict with the Norris-LaGuardia Act. *Id.* at 636.

and thus held §2, First, to be justiciable. We cannot agree with the Fourth Circuit decision. The machinery to prevent strikes which was the Congressional purpose in enacting the Railway Labor Act is contained within the procedures of the Act and not outside it in the injunctive power of the federal courts. We believe that the provisions of the Act and the powers of the National Mediation Board can enforce the duty to bargain in good faith without the need of judicial interference.

AFFIRMED.

A true Copy:
Teste:

.....
Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX C

CORRECTED

—OPINION BY JUSTICE CLARK—

UNITED STATES COURT OF APPEALS ..
FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

August 1, 1972
Before
Hon. Tom C. Clark,

Assoc. Justice of U.S. Supreme Court
Hon. Walter J. Cummings,

Circuit Judge
Hon. Wilbur F. Pell, Jr.,

Circuit Judge

No. 72-1115

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, *Plaintiff-Appellant* vs. UNITED TRANSPORTATION UNION, *Defendant-Appellee.*	Appeal from the United States District Court for the Northern District of Illinois Eastern Division

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the Opinion of this Court filed this day.

APPENDIX D

Section 1 of the Norris-LaGuardia or Anti-Injunction Act of 1932, 47 Stat. 70, 29 U.S.C., § 101, provides:

> That no court of the United States, as herein defined, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this Act; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this Act.

Section 4 of the Norris-LaGuardia or Anti-Injunction Act of 1932, 47 Stat. 70, 29 U.S.C., § 104, provides:

> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:
>
> (a) Ceasing or refusing to perform any work or to remain in any relation of employment;
>
> (b) Becoming or remaining a member of any labor organization or any employer organization, regardless of any such undertaking or promise as is described in section 3 of this Act;
>
> (c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;
>
> (d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 3 of this Act.

Section 5 of the Norris-LaGuardia or Anti-Injunction Act of 1932, 47 Stat. 71, 29 U.S.C., § 105, provides:

No court of the United States shall have jurisdiction to issue a restraining order or temporary or permanent injunction upon the ground that any of the persons participating or interested in a labor dispute constitute or are engaged in an unlawful combination or conspiracy because of the doing in concert of the acts enumerated in Section 4 of this Act.

Section 7 of the Norris-LaGuardia or Anti-Injunction Act of 1932, 47 Sta. 71, 29 U.S.C., § 107, provides:

No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as herein defined, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also to the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property: *Provided, however,* That if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days. No temporary restrain-

ing order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.

The undertaking herein mentioned shall be understood to signify an agreement entered into by the complainant and the surety upon which a decree may be rendered in the same suit or proceeding against said complainant and surety, upon a hearing to assess damages of which hearing complainant and surety shall have reasonable notice, the said complainant and surety submitting themselves to the jurisdiction of the court for that purpose. But nothing in this section contained shall deprive any party having a claim or cause of action under or upon such undertaking from electing to pursue his ordinary remedy by suit at law or in equity.

Section 9 of the Norris-LaGuardia or Anti-Injunction Act of 1932, 47 Stat. 72, 29 U.S.C., § 72, provides:

No restraining order or temporary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of findings of fact made and filed by the court in the record of the case prior to the issuance of such restraining order or injunction; and every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly

included in said findings of fact made and filed by the court as provided herein.

The All-Writs statute, 1 Stat. 73, 28 U.S.C. § 1651, provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Rule 62(c), F.R. Civ. P. provides:

> Injunction Pending Appeal. When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party. If the judgment appealed from is rendered by a district court of three judges specially pursuant to a statute of the United States, no such order shall be made except (1) by such court sitting in open court or (2) by the assent of all the judges of such court evidenced by their signatures to the order.

APPENDIX B

Notice of Appeal

IN THE DISTRICT COURT OF THE UNITED STATES

• • (Caption—69 C 2401) • •

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND AN INJUNCTION PENDING APPEAL

This cause coming on to be heard on the plaintiff's motion for an injunction pending appeal; and the Court, having previously heard the evidence and having entered Findings of Fact, Conclusions of Law, and a Decree on December 22, 1971, and now having heard argument of counsel and being fully advised in the premises, hereby issues its Findings of Fact, Conclusions of Law, and an Injunction Pending Appeal:

FINDINGS OF FACT

1. In its Findings of Fact and Conclusions of Law of December 22, 1971, the Court found that the defendant union had, in its negotiations with the railroad since September 9, 1971, negotiated in compliance with Section 2 First of the Railway Labor Act (45 U.S.C. §152 First) and that the Court was without jurisdiction to issue a permanent injunction against a strike by the union over the parties' crew-consist controversy. (Findings of Fact Nos. 87-89; Conclusions of Law Nos. 4, 5, 7 and 12).

2. The plaintiff, Chicago and North Western Railway Company, on January 6, 1972, filed a notice of appeal to the United States Court of Appeals for the Seventh Circuit from this Court's decree of December 22, 1971.

3. The issues involved in the plaintiff's appeal are substantial, for "this is a case of first impression" and "the Supreme Court laid down no guidelines as to how this Court should proceed" upon the remand of this case by the Supreme Court.

4. By reason of the Court's decree of December 22, 1971, the defendant union may engage in a strike against the plaintiff railroad if not enjoined therefrom pending appeal.

5. A strike of the plaintiff railroad by the defendant union during the railroad's appeal likely would result in a mooting of the appeal.

6. An injunction pending appeal is necessary to maintain the status quo pending determination of the plaintiff's appeal.

7. A strike of the plaintiff railroad by the defendant union during the plaintiff's appeal would irreparably injure the plaintiff and the public in that the plaintiff would be forced to suspend the transportation of passengers and freight, with the consequences that the plaintiff would be deprived of hundreds of thousands of dollars in revenues each day the strike continued, many of its employees would be deprived of their employment and wages for the duration of the strike, many businesses and governmental agencies would be deprived of essential transportation services, and railroad transportation in a large area of the United States would be seriously impaired so as to impede seriously the transportation of passengers (including approximately 90,000 commuter passengers daily in the Chicago area), mail, freight and express lading (including Government mail and express,

military personnel, and material), and food and other lading essential to the public health and safety.

8. The balance of equities herein favors the granting of an injunction pending appeal, because if an injunction pending appeal was not granted the plaintiff railroad and the public would suffer greater harm from a strike than the defendant union will suffer by being enjoined from striking until a determination of the plaintiff's appeal.

CONCLUSIONS OF LAW

1. The Court has jurisdiction to issue an injunction pending appeal in this case under Rule 62(c) of the Federal Rules of Civil Procedure and under the "All Writs Act" contained in the Judiciary Act of 1789, 28 U.S.C. §1651, as interpreted by the Court of Appeals for the Seventh Circuit in *Chicago and N. W. Ry.* v. *United Transportation Union,* 422 F. 2d 929 (7th Cir. 1970).

2. An injunction pending appeal should be issued in this case to permit the orderly determination by the Court of Appeals for the Seventh Circuit of the plaintiff's appeal, because such appeal raises important issues concerning the future administration of the Railway Labor Act (45 U.S.C. §§151-160).

INJUNCTION PENDING APPEAL

This cause having come on for hearing upon the plaintiff's motion for an injunction pending its appeal to the United States Court of Appeals for the Seventh Circuit from this Court's decree of December 22, 1971, and the Court having heard all arguments by counsel for both parties and having this day made the foregoing Findings

of Fact and Conclusions of Law, the Court in accordance therewith enters the following Injunction Pending Appeal:

IT IS THEREFORE ORDERED:

(1) that the United Transportation Union, each of its lodges, divisions, locals, officers, agents, employees, and members, and all persons acting in concert with them, be and they are hereby enjoined, pending the hearing and determination of the plaintiff's appeal to the United States Court of Appeals for the Seventh Circuit, from authorizing, calling, encouraging, permitting, or engaging in any strike against the plaintiff and from picketing the premises of the plaintiff over any dispute as to the proper consist of road and yard crews;

(2) that this injunction pending appeal is granted on the condition that an undertaking in the sum of One Million Dollars ($1,000,000.00) be filed to make good such damages not to exceed said sum as may be suffered or sustained by the defendant if found to be wrongfully enjoined;

(3) that this injunction pending appeal may be served by any person over the age of eighteen years, selected for that purpose by the plaintiff.

s/ J. S. Perry

United States District Judge

Dated: January 10, 1972.